the world. May you command our Corps with strength, vision and the same commitment to core values that marked the leadership of the Commandants who precede you. The Corps will be blessed with the unfailing support of your delightful wife Zandi. On Tuesday of this week the 31st Commandant and his lady celebrated their 31st wedding anniversary.

Today is important not only for Marines, but also for every American, and especially those who have worn a military uniform. It is a special day for us to remember the Corps' heroic past and to celebrate its bright future.

The fundamental military values of honor, courage and commitment are as much a part of the Marine Corps today as they were at its birth in 1775. Marines today understand that these values represent an ideal . . . an ideal worth fighting for.

Fighting for ideals is what the Corps is all about. And, the strength of today's Corps rests on a foundation of extraordinary heroism rising up from the bedrock of America's military history.

It is on that foundation of past heroism that the future of the Corps will be built. It will be a future filled with innovation, flexibility, resourcefulness and above all spirit. It is a spirit which comes from being the best. Marines know that when American interests are threatened or our friends need help . . . America calls the Corps.

Throughout the past four years, Marines have been called very often and, as throughout their history, they have responded with the utmost professionalism. Whether it was Haiti, Somalia, Bosnia or the Arabian Gulf, the Marines were always ready to get the job done . . . and to get it done right.

Whether as warfighters, peacekeepers, or rescuers; the Marines have proven time and time again that America can count on the Corps when there is a threat to our national security.

The Marine Corps of today is just the adaptable, flexible, and resourceful force America needs. In this unsettled and often confusing post Cold War world, the military mission is no longer as clearly defined. For this reason our military forces must adapt in order to succeed.

Adapting is what Marines do best. The Marines have been fighting America's wars for two centuries and continue to be the force of choice for either keeping the peace; or storming the beach.

In the past, Marines have done more beach storming than peacekeeping, but in the future it is clear that both missions will need to be performed. In my mind there is no force in the world more capable of handling the complicated military missions of the future than the United States Marine Corps.

The Corps has had many great Commandants, but none who has led through such a tumultuous period of internal change. Today the Corps has never been better trained, better led, or more ready. Only in this state would Carl Mundy even consider relinquishing command of the Corps.

That is your legacy, ''a RELEVANT, READY and CAPABLE Corps of Marines'' who embody the traditions of the past and who are ready to meet the challenges of the future. RELEVANT to meet the defense needs of the Nation tomorrow; READY to respond instantly as America's 911 Force to prevent and contain crises or fight today; and CAPABLE of meeting the requirements of our National Military Strategy.

Carl, your days in uniform may soon be over, but your service to the Corps will remain timeless. Your total devotion to the Corps has nurtured America's undying love for Marines. Your determination efforts have ensured that Marines will always be the first to fight in America's defense.

Yesterday afternoon, in the oval office, our Commander in Chief promoted Chuck Krulak to General. In that ceremony President Clinton pointed to Carl Mundy and said emphatically, ''Of all the General Officers I have worked with, you were the one I knew was always telling me exactly what you believed. I want you to know how much I appreciate that.'' The President of the United States could not have offered higher praise.

For fifty years Iwo Jima has been a special place for the Marine Corps, and it was there atop Mount Suribachi that I had the privilege to announce the President's nomination for our 31st Commandant.

So as we consider the significance of this ceremony, a change of command of the Corps that these two Marines have devoted their lives to, I think it appropriate to recall the words of Chaplain Roland Gittelsohn when he dedicated the Fifth Marine Division Cemetery on Iwo Jima fifty years ago. This February, Rabbi Gittelsohn recalled his words at the ceremony commemorating that battle at the Iwo Jima War Memorial beside Arlington National Cemetery. He said:

''Here lie officers and men of all colors, rich men and poor men together. Here are Protestants, Catholics and Jews together. Here no man prefers another because of his faith or despises him because of his color. Here there are no quotas of how many from each group are admitted or allowed. Among these men there is no discrimination. No prejudice. No hatred. Theirs is the highest and purest democracy.

''Any man among us, the living, who failed to understand that, will thereby betray those who lie here . . . whoever lifts his hand in hate against a brother, or thinks himself superior to those who happen to be in a minority, makes of . . . their sacrifice an empty, hollow mockery.

''Thus do we consecrate ourselves, the living, to carry on the struggle they began. Too much blood has gone into this soil for us to let it lie barren.''

Those words spoken in honor of fallen Marines and Sailors hold a living truth. The truth is that we, the living, must carry on their struggle for liberty and freedom everyday, and in everything we do.

God bless you, and God bless the United States Marine Corps. Semper Fidelis.

H.R. 956 (PRODUCTS LIABILITY BILL) AND PRICE-ANDERSON ACT

Mr. HEFLIN. Mr. President, during the course of debate on the products liability bill, I mentioned nuclear power plants and the possible effect that the proposed legislation might have on two issues dealing with a nuclear power plant problem—one being the issue of pain and suffering and the other being the statute of repose.

Then on May 9, 1995, I spoke on this issue in the U.S. Senate. I concluded my remarks by saying that I wanted to do further research pertaining to these issues.

I asked the Congressional Research Service of the Library of Congress to look into this and they have prepared a memorandum. I ask unanimous consent that the attached memorandum from the Congressional Research Service be printed in the CONGRESSIONAL RECORD following my remarks.

There being no objection, the memorandum was ordered to be printed in the RECORD, as follows:

CONGRESSIONAL RESEARCH SERVICE,
LIBRARY OF CONGRESS,
Washington, DC, May 23, 1995.

To: Sen. Howell Heflin; Attention: Jim Whiddon.

From: American Law Division.

Subject: Causes of Action under the Price-Anderson Act.

This is in response to your request for a memorandum addressing whether state causes of action based on public liability exist under the Price-Anderson Act.[1] In particular, your inquiry asks that we address survival of state tort action, statutes of limitation and repose, and the impact of the recently passed products liability legislation (the House-passed and Senate-passed versions of H.R. 956, 104th Congress).

In Parts I and II, we analyze the Act's language, legislative history and relevant case law, concluding that the 1988 Amendments Act created a federal cause of action. Whereas state causes of action based upon public liability existed under Price-Anderson prior to the 1988 amendments, such is no longer the case. The only state tort actions that may continue to survive are those completely outside the Price-Anderson public liability scheme. Under the 1988 Amendments Act, federal courts, which have original jurisdiction over public liability actions arising out of nuclear incidents, are directed to apply state law substantive rules. With the exception of waiver of defenses provisions regarding extraordinary nuclear occurrences, the Price-Anderson Act, as amended, lacks a specific statute of limitations for public liability actions arising out of nuclear incidents. As such, courts will apply the statute of limitations in effect in the state in which the nuclear incident occurred. In Part III, we analyze the possible impact of the statutes of limitation and repose as contained in the recently passed products liability legislation in light of the Price-Anderson scheme.

I. BACKGROUND

In 1957, the Price-Anderson Act was enacted as an amendment to the Atomic Energy Act in order to remove the deterrent of potentially catastrophic liability to those in the private sector who were interested in participating in the nuclear power industry but reluctant to risk significant financial resources and liability.[2] In 1966, the Act was extended for another ten year period and a key provision—a waiver of defenses provision[3]—was added. Under this provision, the defendant in any action involving public liability[4] arising from an ''extraordinary nuclear occurrence''[5] can be required to waive certain legal defenses (e.g., defenses based on conduct, immunity, and state statutes of limitation).[6] It is clear that the Act, as originally enacted and as amended in 1966, was intended to have minimal inference with State law.[7] Also in 1966, the Act was amended to include a provision authorizing the consolidation in one U.S. District Court of all law suits arising from an ''ENO''—conferring original jurisdiction upon the Federal courts in such cases.[8] The Act was amended again in 1975.

A long line of cases under the Act as amended through 1975 had held that federal courts did not have subject matter jurisdiction for claims arising out of non–ENO nuclear incidents and that state tort remedies were *not* preempted by the Act.[9]

II. 1988 AMENDMENTS

Under the Price-Anderson Amendments Act of 1988, original federal jurisdiction was significantly broadened to cover not only those actions arising from ENOs but those

[1] Footnotes at the end of the article.

arising from any ''nuclear incident.'' [10] A definition of the term ''public liability action'' [11] was added with provision made for the substantive rules for decision to be derived from State law.[12] As the Act now reads, the applicable section—§170(n)(2) [13]—states:

''With respect to any *public liability action* arising out of or resulting from a *nuclear incident*, the United States district court in the district where the nuclear incident takes place . . . shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. . . . [emphasis added].''

Section 170(n)(2) continues with provision that public liability actions pending in state court shall be removed or transferred to the appropriate federal district court ''upon motion of the defendant or of the Commission [NRC] or the Secretary [of HHS].''

The legislative history makes it clear that these changes were intended to confer original jurisdiction in the federal district courts and that Congress chose this option rather than designing a new body of substantive law to govern such cases.[14]

CASE LAW UNDER THE 1988 AMENDMENTS

A recent Third Circuit Court of Appeals decision, *In Re TMI Litigation Case Consol. II* [15] stated:

''Under the terms of the Amendments Act, the ''public liability action'' encompass ''any legal liability'' of any ''person who may be liable'' on account of a nuclear incident. . . . Given the breadth of this definition, the consequence of a determination that a particular plaintiff has failed to state a public liability claim potentially compensable under the Price Anderson Act is that he has no such claim at all. After the Amendments Act, no state cause of action based upon public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or it is not compensable at all. Any conceivable state tort action which might remain available to a plaintiff following the determination that his claim could not qualify as a public liability action, could not be one based on ''any legal liability'' or ''any person who may be liable on account of a nuclear incident.'' It would be some other species of tort altogether, and the fact that the state courts might recognize such a tort has no relevance to the Price-Anderson scheme. At the threshold of any action asserting liability growing out of a nuclear incident, then, there is a federal definitional matter to be resolved: Is this a public liability action? If the answer to that question is ''yes,'' the provisions of the Price-Anderson Act apply; there can be no action for injuries caused by the release of radiation from federally licensed nuclear power plants separate and apart from the federal public liability action created by the Amendments Act.[16]''

The court went on to state:

''The Amendments Act creates a federal cause of action which did not exist prior to the Act, establishes federal jurisdiction for that cause of action, and channels all legal liability to the federal courts through that cause of action. . . . Thus, Congress clearly intended to supplant all possible state causes of action when the factual prerequisite of the statute are met.[17]''

Another recent Court of Appeals decision, *O'Conner* v. *Commonwealth Edison Co.*,[18] held that the Amendments Act embodies substantive federal policies and, rather than merely create federal jurisdiction for a state claim, created a new federal cause of action that supplanted the prior state cause of action.[19] With regard to the interpretation of the phrase ''law of the State'' as it appears in the definition of ''public liability action.'' [20] a recent case of first impression reasoned that the phrase was intended to be broadly defined—to include the whole law of the state (state substantive law and choice of law provisions).[21] Another recent federal court decision noted that because Price-Anderson provides no statute of limitations, the limitations period must be borrowed from State law.[22]

FEDERAL CAUSE OF ACTION BASED ON STATE SUBSTANTIVE LAW

The Price-Anderson Act, as originally drafted, did not create a federal cause of action. However, it is clear that the Amendments Act of 1988—although relying up on state law elements—does. The 1988 Amendments Act broadened the scope of the Price-Anderson Act and provides for retroactive subject matter jurisdiction in the federal courts over claims involving nuclear incidents and Specifically, federal courts have original jurisdiction over any ''public liability action'' arising out of a ''nuclear incident.'' [23]

The new definition of ''public liability action'' created a federal cause of action (while directing the federal courts to apply state law) by stipulating that any such suit be deemed to be an action arising under the Price-Anderson Act—meeting Constitutional requirements. [24] In the Amendment Act, Congress created a federal tort which has its origins in state law. The basis of the action no longer stems from state law but now arises from federal law.[25] State law rules shall apply unless inconsistent.[26]

If the public liability action results from an ENO, the federal statute of limitations provided in §170(n)(1) may apply. If the indemnity agreement required under the Act incorporated a waiver of defenses based on a statute of limitations, state statutes of limitations that are more restrictive than that prescribed in §170(n)(1) (3-years-from discovery) will be superseded while those that are less restrictive (e.g., longer than the prescribed period) will remain in effect. The Act contains no other federal statute of limitations [27] other than that provided in the case of waiver of defenses with respect to ENOs. Therefore, to the extent that a state provides for a specific statute of limitations (not otherwise inconsistent with §170 of the Act), the federal court (or state court if such action is not removed or transferred) appears to be required to apply such state law provision.[28]

III. EFFECTS OF PRODUCTS LIABILITY BILL [29]

Products liability suits are subject in every state to a statute of limitations, which is a period of time after an injury or illness occurs, or after its symptoms or their cause is discovered, within which an action must be brought. A minority of states have also enacted a statute of repose, which bars products liability suits where the injury-causing products exceeds a specified age. The House-passed version of H.R. 956 contains no statute of limitations, whereas the Senate-passed version contains a two-year statute of limitations. Both bills contain statutes of repose, but they are significantly different.

STATUTE OF LIMITATIONS

Because the House-passed version of H.R. 956 contains no statute of limitations, it would not affect the Price-Anderson Act, which, as noted, also has none and therefore applies the applicable state statute of limitations. Section 109(a) of the Senate-passed version of H.R. 956 has a two-year statute of limitations, but section 102(c)(2) of the bill provides that nothing in it ''may be construed to . . . supersede or alter any Federal Law.'' However, section 102(b)(1) provides that the bill supersedes state law ''to the extent that State law applies to an issue covered under [the bill].''

As noted, the Price-Anderson Act, as amended in 1988, creates a federal cause of action and does not permit state causes of action within its public liability scheme. Because the Senate-passed version of H.R. 956 would not supersede or alter any federal law, it appears that it would not alter the Price-Anderson's Act scheme of using state statutes of limitations. One could argue that, because the Price-Anderson Act uses state statutes of limitations, and the Senate-passed bill supersedes state law, the Price-Anderson Act therefore would use the Senate-passed bill's statute of limitations. Although this interpretation does not seem out of the question, it appears that the better view would be that to use the Senate-passed bill's statute of limitations in Price-Anderson Act cases would be to supersede a federal law, which would be contrary to the bill's expressed intent. Nevertheless, as this seems uncertain, it might be advisable for Congress to make its intention explicit.

STATUTES OF REPOSE

Section 109(b) of the Senate-passed version of H.R. 956 contains a 20-year statute of repose applicable to any product that is a ''durable good.'' The definition of this term, in section 101(6), apparently is confused in its incorporation of the Internal Revenue Code, but essentially includes products used in a trade or business but not consumer goods. Therefore, we will assume that the term would include nuclear power plants and their component parts.

The Senate bill's statute of repose would not apply, even to durable goods, in four situations: (1) cases of toxic harm; (2) where the product is ''[a] motor vehicle, vessel, aircraft, or train that is used primarily to transport passengers for hire''; (3) where the defendant made an express written warranty as to the safety of the product that was longer than 20 years, but, at its expiration, the statute of repose would apply; and (4) small aircraft covered by the 18-year statute of repose prescribed by the General Aviation Revitalization Act of 1995, Public Law 103–298, 49 U.S.C. §40101 note.

Section 106 of the House-passed version of H.R. 956 contains a 15-year statute of repose applicable to all products, including consumer goods, except small aircraft, covered by the 18-year statute of repose prescribed by the General Aviation Revitalization Act of 1995. There are only two other exceptions to the House bill's 15-year statute of repose: (1) if the defendant made an express written warranty as to the safety of the product that was longer than 15 years, the warranty would apply, but, at its expiration, the statute of repose would apply; and (2) the 15-year statute of repose would ''not apply to a physical illness the evidence of which does not ordinarily appear less than 15 years after the first exposure to the product.''

With respect to the preemption of other laws, the House- and the Senate-passed bills are the same with respect to federal laws but different as to state laws. With respect to federal laws, section 102(c)(2) of the Senate-passed bill provides, as noted above, that nothing in it ''may be construed to . . . supersede or alter any Federal law.'' Similarly, section 402(2) of the House-passed bill provides that nothing in it ''shall be construed to . . . supersede any Federal law.'' (The Senate-passed bill's not using the word ''alter'' would not appear to be of any consequence.)

With respect to state laws, section 101(b) of the House-passed bill, like section 102(b)(1) of the Senate-passed bill, provides that the bill supersedes state law ''to the extent that State law applies to an issue covered under [the bill].'' However, the Senate-passed bill, but not the House-passed bill, contains an

exception applicable to its statute of repose. It provides that, if a state law prescribes a shorter statute of repose, such state law would apply. All state statutes or repose are shorter than 20 years, but fewer than half the states have statutes of repose. Therefore, the effect of the Senate-passed bill would be to impose a 20-year statute of repose on the majority of states without statutes of repose, but to leave the other state's statutes of repose as they are.

How would these provisions affect the Price-Anderson Act? This depends upon whether the Price-Anderson Act incorporates state statutes of repose, as it does state statutes of limitations. We have found no authority on point, but it appears unlikely that it would incorporate state statutes of repose. This is because such statutes can preclude suits from being filed even before an injury occurs, and, as the Price-Anderson Act creates a federal cause of action, it seems unlikely that a court would construe it, in the absence of some expression of congressional intent, to allow a state to preclude use of a federal cause of action. If the Price-Anderson Act does not incorporate state statutes of repose, then neither the House- nor Senate-passed statutes of repose would apply, as both bills state that they would not supersede federal law.

If, however, the Price-Anderson Act does incorporate state statutes of repose, then we may apply the same analysis we did with respect to the Senate-passed bill's statute of limitations. We repeat what we wrote there, substituting ''statute of repose'' for ''statute of limitations,'' and referring to both versions of H.R. 956 instead of only the Senate-passed version: Because neither version of H.R. 956 would supersede any federal law, it appears that neither would alter the Price-Anderson's Act scheme of using state statutes of repose. One could argue that, because the Price-Anderson Act uses state statutes of repose, and both the House- and Senate-passed versions of H.R. 956 would supersede state law, the Price-Anderson Act would use the House- or Senate-passed bill's statute of repose. Although this interpretation does not seem out of the question, it appears that the better view would be that to use either bill's statute of repose in Price-Anderson Act cases would be to supersede a federal law, which would be contrary to either bill's expressed intent.

Suppose, however (continuing to assume that the Price-Anderson Act incorporates state statutes of repose, which appears more likely not to be the case), that the Price-Anderson Act would use the House- or Senate-passed bill's statute of repose. Then the effect of the bills would differ. The House-passed bill's 15-year statute of repose would apply in every case, but the Senate-passed 20-year statute of repose would apply only in those states that do not have a shorter statute of repose. In those states that do have a shorter statute of repose, it would apply.

As noted, however, it seems more likely that state statutes of repose do not apply now and that no statute of repose would apply under either the House- or Senate-passed bills. Again, though, it might be advisable for Congress to make its intentions explicit.

HENRY COHEN,
Legislative Attorney.
ELLEN M. LAZARUS,
Legislative Attorney.

FOOTNOTES

[1] Act Sept. 2, 1957, Pub. L. 85–256, 71 Stat. 576, as codified at 42 U.S.C. 2210; amending the Atomic Energy Act of 1954 (Act of Aug. 30, 1954, as codified at 42 U.S.C. §§2011 et seq.). The Act was amended in 1966 (Pub. L. 89–645, 80 Stat. 891); 1975 (Pub. L. 94–197, 89 Stat. 1111); 1988 (Pub. L. 100–408, 102 Stat. 1066; hereinafter referred to as the 1988 Amendments Act or the Amendments Act of 1988).

[2] S. Rep. No. 218, 100th Cong., 1st Sess. 2 (1987), reprinted in 1988 U.S.C.C.A.N. 1476–77.

[3] §170n(1); 42 U.S.C. §2210(n)(1). The waiver of defenses provision was seen as a preferable alternative to enactment of a new body of Federal tort law. See S. Rep. No. 1605, 89th Cong., 2d Sess. 10 (1966), reprinted in 1966 U.S.C.C.A.N. 3209.

[4] Section 11 of the Atomic Energy Act, 42 U.S.C. §2014(w) defines the term ''public liability'' as ''any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation . . . except: (i) claims under State or Federal workmen's compensation acts . . . (ii) claims arising out of an act of war; and (iii) whenever used in subsections a., c., and k. of §170 [42 U.S.C. §§2210(a), (c), (k)], claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity where the nuclear incident occurs. . . .''

[5] See §11 Atomic Energy Act, 42 U.S.C. §2014(j) for definition of an extraordinary nuclear occurrence (hereinafter referred to as ENO and generally considered a serious nuclear accident). No nuclear incidents to date have been classified as ENOs.

[6] 42 U.S.C. §2210(n)(1). The Act also provides certain exceptions to the applicability of waivers.

The 1966 Amendments provided that defenses based on statutes of limitations were waived if the suit is instituted within 3 years from when the claimant first knew or reasonably could have known of his injury or damage but in no event more than 10 years after the date of the nuclear incident). Per the legislative history, the stipulated statute of limitations period was not ''a maximum period for assertion of Price-Anderson covered claims, since the waiver authorized by the bill serves only to avoid the application of more restrictive State statutes of limitations. Such waiver leaves undisturbed the laws of those States which have enacted—or in the future may enact—longer periods of limitation.''

See S. Rep. No. 1605, supra n.3 at 21, reprinted at 1966 U.S.C.C.A.N. 3221. The minimum statute of limitations for the filing of claims after an accident supersedes more restrictive State statutes of limitations, but does not affect less restrictive State laws. See S. Rep. No. 70 100th Cong., 2d Sess. 15 (1988), reprinted at 1988 U.S.C.C.A.N. 1427.

In 1975, the Act was again amended; among the amendments was an extension of the statute of limitations from 10 to 20 years. The 1988 Amendments to the Act eliminated the 20 year ''years-from-occurrence'' limitation; the legislative history makes it clear that ''. . . a damage suit could be filed at any time after an ENO, provided the suit is instituted within 3 years from the time that the claimant first know, or reasonable could have known, of his injury or damages caused by the ENO. This new standard would supersede any more restrict State tort law standards in existing law with respect to statutes of limitations.''

See S. Rep. No. 70, id. at 21, reprinted at 1988 U.S.C.C.A.N. 1434. The new standard is considered a Federal standard. Id. at 33, reprinted at 1988 U.S.C.C.A.N. at 1455. See also H. Rep. No. 104, Part 1, 100th Cong., 1st Sess. 17 (1987) referring to the existing (pre-1988) standard as ''more restrictive than the majority of state statutes . . . [and] ineffective to prevent restrictive state statutes from barring legitimate claims.''

As presently stated, the Federal standard is absent any years-from occurrence limitation but includes a 3 year-from-discovery period. When incorporated into an indemnity agreement, ''such waivers shall be judicially enforceable in accordance with their terms by the claimant against the person indemnified.'' 42 U.S.C. §2210(n)(1).

[7] See S. Rep. No. 1605, supra n. 3 at 6–10 (1966), reprinted at 1966 U.S.C.C.A.N. 3206–3210. Under the Price-Anderson system, the claimant's right to recover from the fund established by the act is left to the tort law of the various States; the only interference with State law is a potential one, in that the limitation of liability features . . . would come into play in the exceedingly remote contingency of a nuclear incident giving rise to damages in excess of the amount of financial responsibility required together with the amount of the governmental indemnity.

Id. at 6.

In Duke Power v. Carolina Env. Study Group, 438 U.S. 59, 65–66 (1978), the High Court referred to the 1966 waiver of defenses provision as based on a congressional concern that state tort law dealing with liability for nuclear incidents was generally unsettled and that some way of insuring a common standard of responsibility for all jurisdictions—strict liability—was needed. A waiver of defenses was thought to be the preferable approach since it entailed less interference with state tort law than would the enactment of a federal statute prescribing strict liability.

[8] §170(n)(2); 42 U.S.C. §2210(n)(2).

[9] See Commonwealth of Pennsylvania v. General Pub. Util. Corp., 710 F.2d 117 (3d Cir. 1983); Stibitz v. GPU, 746 F.2d 993 (3d Cir. 1984); Kiick v. Metropolitan Edison Co, 784 F.2d 490 (3d Cir. 1986); Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984).

[10] §11(a); 42 U.S.C. 2210(n)(2). Section 11 of the Atomic Energy Act, 42 U.S.C. §2014(q), defines a ''nuclear incident'' as: ''. . . any occurrence, including an extraordinary nuclear occurrence, within the United States, causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material. . . .''

With regard to the change from consolidating only ENOs in federal court to consolidating claims arising out of any nuclear incident, the legislative history states: ''. . . [T]he bill provides the federal district court in which the nuclear incident occurred with subject matter jurisdiction over claims arising from the nuclear incident. Any suit asserting public liability shall be deemed to be an action arising under the Price-Anderson Act, and the substantive law of decision shall be derived from the law of the State in which the incident occurred, in order to satisfy the Article III requirement that federal courts have jurisdiction over cases arising under the Constitution or under the laws of the United States.''

See S. Rep. No. 218, supra n. 2 at 13, reprinted at 1988 U.S.C.C.A.N. 1488.

On a related matter, see reference in legislative history to the effect of extending the waiver of defenses provision to include radioactive waste activities: The effect of this provision would be to trigger strict liability, and to preempt lesser State tort law standards in any lawsuit involving an accident with radioactive waste that DOE determines to be an ''extraordinary nuclear occurrence.''

S. Rep. No. 70, supra n. 6 at 26, reprinted at 1988 U.S.C.C.A.N. 1439.

[11] Section 11 of the Atomic Energy Act, 42 U.S.C. §2014(hh) defined ''public liability action'' as used in §170 as: ''. . . any suit asserting liability. A public liability action shall be deemed to be an action arising under §170 [42 U.S.C. §2210], and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.''

[12] See H. Rep. No. 104, Part 1, supra n. 6 at 18 (1987), at which the Committee on Interior and Insular Affairs states: ''Rather than designing a new body of substantive law to govern such cases, however, the bill provides that the substantive rules for decision in such actions shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the Price-Anderson Act. The Committee believes that conferring on the Federal courts jurisdiction over claims arising out of all nuclear incidents in this manner is within the constitutional authority of Congress. . . .''

As stated in Re TMI Litigation Cases Consol. II, 940 F.2d 832 (2d Cir. 1991): ''. . . Congress expressed its intention that state law provides the content of and operates as federal law.''

Id. at 855.

[13] 42 U.S.C. §2210(n)(2).

[14] See S. Rep. No. 218 supra note 2 at 13; see also H. Rep. No. 104, Part 1, 100th Cong., supra n. 6 at 18 (1987).

[15] 940 F.2d 832 (3d Cir. 1991), cert. denied, 503 U.S. 906 (1992).

[16] Id. at 854–55.

[17] Id.at 856–57.

[18] 13 F.3d 1090 (7th Cir. 1994), cert. denied, 1994 U.S. Lexis 4722.

[19] Id. at 1096, 1099.

[20] See definition supra, at n. 11.

[21] In Re Hanford Nuclear Reservation Litigation, 780 F. Supp. 1551 (E.D. Wash. 1991), relying on Richards v. United States, 369 U.S. 1 (1962) (interpretation of similar phrase in Federal Tort Claims Act); Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) (interpretation of Outer Continental Shelf Lands Act (OCSLA) provision). See also reference in legislative history to Article III jurisdiction approach that Congress used in the OCSLA; H. Rep. No. 104, Part 1, supra note 6 at 18.

[22] See Day v. NLO, 3 F.3d 153, 154 n. 1 (6th Cir. 1993). See also the trial court decision in Cook v. Rockwell Intl' Corp., 755 F. Supp. 1468, 1482 (D. Colo. 1991) motion denied, 1995 U.S. Dist. Lexis 4986 (D. Colo. 1995) (In response to claim that Price-Anderson was ''silent'' on what limitations should apply, party contended that a state statute establishing a specific

limitation period for ''all actions upon liability created by a federal statute where no period of limitations is provided in said federal statute'' should apply. The court held that such state statutory period did not apply because Price-Anderson provided for a limitations period by mandating the application of state substantive law and that statutes of limitations are substantive).

[23] Although federal courts have original jurisdiction over such actions, states have concurrent jurisdiction. See §2210(n)(2). Subject to removal upon motion, public liability actions may be filed in state courts; in a case in which such action proceeds in state court, §2014(hh) requires that the law of the State in which the nuclear incident occurred determine the rules for decision.

[24] See Article III, §2, cl. 1, U.S. Constitution: ''The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution.. . .''

The issue of whether Congress exceeded its authority under Article III in creasing ''arising under'' jurisdiction even where stipulating that such actions were to be derived from state law has been addressed in a number of opinions issued under the Amendments Act. In vacating and remanding a district court holding that the Amendments Act was unconstitutional, the Circuit Court of Appeals in Re TMI Litigation Cases Consol. II, 940 F.2d 832, 845 (3d Cir. 1991) stated: ''It could not be clearer that Congress intended that there be federal jurisdiction over claims removed pursuant to the Amendments Act; the statutory language is explicit.'' The court, in analyzing subject matter jurisdiction, noted that the Amendments Act ''contains both federal and state elements. While the public liability cause of action itself and certain elements of the recovery scheme are federal, the underlying rules of decision are to be derived from state law.''

Id. at 854.

[25] See In Re TMI Litigation Cases Consol. II, supra n. 15 at 857–58.

[26] Note, for example, that under §170(s); 42 U.S.C. §2210(s) ''No court may award punitive damages in any action with respect to a nuclear incident . . . against a person on behalf of whom the United States is obligated to make payments under an agreement of indemnification covering such incident.. . .''

[27] See, however, §167 of the Atomic Energy Act, 42 U.S.C. §2207, authorizing the Commission to pay ''any claim for money damage of $5,000 or less against the United States for bodily injury, death, or damage . . . where such claim is presented to the Commission in writing within one year after the accident or incident out of which the claim arises.. . .''

[28] If a federally created right of action has a specific statute of limitations, such a right is enforced free from any state limitation period. In such a case, the provision is regarded as one of substantive right setting a limit to the existence of the statutory obligation. Where a federal right has been created without providing a limitation of actions to enforce such a right, since there is no federal statute of limitations of general application, the courts generally apply the forum state's statute of limitations. As such, federal courts will borrow the periods of limitation prescribed by the state where Congress has created a federal right but has not prescribed a period for its enforcement. See 51 am jur 2d limitation of actions §74; 53 C.J.S. limitations of actions §33.

[29] Henry Cohen wrote Part III of the memorandum; Ellen Lazarus wrote Parts I and II.

ATF'S PURCHASE OF 22 OV–10D AIRCRAFT

Mr. GRASSLEY. Mr. President, a news article in this morning's Washington Times says the Bureau of Alcohol, Tobacco and Firearms recently purchased 22 OV–10D aircraft from the Defense Department.

These aircraft were used by the Marine Corps in the Vietnam war for close air support in combat. They were also used in Operation Desert Storm for night observation.

The aircraft are heavily weapons-capable, especially from a law-enforcement perspective. ATF says the planes have been stripped of their weapons. Their purpose, according to ATF, is for surveillance. The planes can locate people on the ground by detecting their body heat.

It's no secret that the ATF is undergoing intense public scrutiny. It has done some real bone-headed things. It has been criticized for enforcing the law while crossing the line of civil rights protections.

ATF's credibility will be even further tested the next 2 weeks when joint committee hearings are held in the other body on the Waco matter. And the Senate Judiciary Committee also will hold hearings on Waco in September.

I raise this issue today, Mr. President, because the purchase of these aircraft in the current climate might continue to feed the public's skepticism, and erode the pubic's confidence in our law enforcement agencies.

For that reason, it is incumbent upon ATF to fully disclose and fully inform the public as to the purchase of these aircraft.

First, what, specifically, will they be used for?

Second, where will they be located?

Third, what assurances are there that the planes will remain unarmed?

The sooner these questions are answered by ATF—openly and candidly—the less chance there is that the public's skepticism will grow.

Mr. President, the continued credibility of the ATF is on the line, in my judgment. At times such as these, when scrutiny is at its highest, the best strategy is to go on the offense. Spare no expense in disclosing fully and swiftly. Because full and swift disclosure is the first step in restoring credibility.

The ATF's credibility is important not just for itself, but for law enforcement in general. There is much work to do to restore the public's trust and confidence. I hope that ATF will step up to the challenge and provide the necessary assurances.

Mr. President, I ask unanimous consent that the Washington Times article, written by Jerry Seper, be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the Washington Times, July 18, 1995]

ATF GETS 22 PLANES TO AID SURVEILLANCE

WEAPONS-CAPABLE AIRCRAFT REPAINTED

(By Jerry Seper)

The Bureau of Alcohol, Tobacco and Firearms has obtained 22 counterinsurgency, heavy-weapons-capable military aircraft.

The 300-mph OV–10D planes—one of several designations used by the Marine Corps during the Vietnam War for gunfire and missile support of ground troops, and by the Air Force during Operation Desert Storm for night observation—have been transferred from the Defense Department to ATF.

The turboprop aircraft, which will be used for day and night surveillance support, were designed to locate people on the ground through their body heat.

When used by the military services, the planes were equipped with infrared tracking systems, ground-mapping radar, laser rangefinders, gun sights and 20mm cannons.

ATF spokeswoman Susan McCarron confirmed yesterday that the agency had obtained the aircraft but noted they had been stripped of their armament. She said that nine of the OV–10Ds were operational and that the remaining 13 were being used for spare parts.

''We have nine OV–10Ds that are unarmed; they have no weapons on them,'' Ms. McCarron said. ''They are being used for surveillance and photography purposes. The remainder are being used for spare parts.''

Ms. McCarron said the aircraft were obtained by ATF from the Defense Department ''when DOD was getting rid of them,'' and that other agencies also had received some of the airplanes.

General Service Administration records show that some of the unarmed aircraft also were transferred to the Bureau of Land Management for use in survey work, while others went to the California Forestry Department for use in spotting fires and in directing ground and aerial crews in combating them.

Other models of the OV-10 also are being used by officials in Washington state for nighttime surveillance of fishing vessels suspected of overfishing the coastal waters.

The transfer of the aircraft to ATF comes at a time of heightened public skepticism and congressional scrutiny of the agency's ability to enforce the law without trampling on the rights of citizens.

The ATF's image suffered mightily in the aftermath of its 1993 raid and subsequent shootout at the Branch Davidian compound in Waco, Texas, during which four agents and six Davidians were killed. It sustained another public-relations blow after it was revealed that ATF agents helped organize a whites-only ''Good O' Boys Roundup'' in the Tennessee hills.

Hearings of the Waco matter begin tomorrow in the House. A Senate Judiciary Committee hearing on the racist trappings of the roundup is scheduled for Friday.

One Senate staffer yesterday said there was ''some real interest'' in the ATF's acquisition of the aircraft, and that questions ''probably will be asked very soon of the agency'' about the specifics of their use and locations where they have been assigned.

According to federal law enforcement sources and others, including two airline pilots who have seen and photographed the ATF planes, two of the combat-capable aircraft—known as ''Broncos''—have been routed to Shawnee, Okla., where they were painted dark blue over the past month at an aircraft maintenance firm known as Business Jet Designs Inc.

Michael Pruitt, foreman at Business Jet Designs, confirmed yesterday that two of the ATF aircraft had been painted at the Shawnee site and that at least one more of the OV–10Ds ''was on the way.'' Mr. Pruitt said the aircraft were painted dark blue with red and white trim. The sources said the paint jobs cost the ATF about $20,000 each.

The firm's owner, Johnny Patterson, told associates last month he expected to be painting at least 12 of the ATF aircraft but was unsure whether he could move all of them fast enough through his shop. Mr. Patterson was out of town yesterday and not available for comment.

According to the sources, the ATF's OV–10Ds, recently were overhauled under the government's Service Life Extension Program and were equipped with a state-of-the-art forward-looking infrared system that allows the pilot to locate and identify targets at nights—similar to the tracking system used on the Apache advanced attack helicopter.

Designed by Rockwell International, the OV–10D originally was outfitted with two 7.62mm M–60C machine guns, each with 500